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No. 92-649

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DANA SCHUMACHER AND LEROY HODGE,
Petitioners

v.

ROBERT N.C. NIX, JR., ET AL.
Respondents

Petition for Writ of Certiorari to The
United States Court of Appeals
For the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where the Circuit Court held that Pennsylvania may constitutionally preclude non-ABA accredited law school graduates from sitting for the Pennsylvania bar examination unless those graduates are members of the bar of a reciprocal state?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are correctly set forth by Petitioner. However, James T. McDermott, Justice of the Supreme Court of Pennsylvania, is deceased. Frank J. Montemuro has succeeded to the position of Justice of the Supreme Court of Pennsylvania formerly held by the late Justice McDermott. In accordance with Rule 35.3, Supreme Court Rules, Justice Montemuro is automatically substituted as a party for the purposes of proceedings in this Court.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Robert N.C. Nix, Chief Justice of the Supreme Court of Pennsylvania, *et al,* (Respondents), respectfully oppose Petitioners' writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit dated July 8, 1992, denying rehearing, has not been reported and is reproduced in Petitioners' Appendix D at A-73 and A-74.

The Opinion and Judgment Order of the Court of Appeals for the Third Circuit is reported at 965 F. 2d 1262, and is reproduced in Petitioners' Appendix A, at A-1

through A-28. The Opinion of the District Court has not been reported; it is reproduced in Petitioners' Appendix B at A-29 through A-47. The Report of the Magistrate has not been reported; it is reproduced in the Petitioners' Appendix C at A-48 through A-72.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Pennsylvania Bar Admission Rules at issue are set forth in Petitioners' Appendix at App. G, at A-78 through A-82. The Equal Protection Clause of the Fourteenth Amendment and the Article IV Privileges and Immunities Clause are set forth in Petitioners' Appendix. at App. F, at A-77.

STATEMENT OF THE CASE

Petitioners are graduates of a non-ABA accredited law school, and have practiced law for five or more years in California, a state which does not grant reciprocity to Pennsylvania lawyers.

Pennsylvania's general rule is that only graduates of ABA-accredited law schools may sit for the Pennsylvania Bar Examination. Pa. B.A.R. 203 (a)(2)(i). The sole exception is for graduates of non-ABA accredited law schools who are members in good standing of the bar of a state which holds a "reciprocal" agreement with Pennsylvania, and who have practiced law in that reciprocal state for five years.

Thus, Pennsylvania's provision waives the threshold educational requirement for admission for applicants from reciprocal states, but not for applicants from nonreciprocal states. The lower courts found no impingement of a fundamental right, no suspect classification, and determined that the state advanced a valid state objective for the rule.

REASONS FOR DENYING WRIT

A. No "special and important" reasons exist for granting the writ of certiorari.

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. These "special and important reasons" include: a conflict between United States courts of appeal on the same matter; a conflict between a state court of last resort and a United States court of appeals; when a state court or United States court of appeals decides a question of federal law in a way which conflicts with an opinion of the United States Supreme Court; or where a United States court of appeals has decided an important question of federal law which "should" be settled by the United States Supreme Court. Rule 10.1 (a)-(c), Supreme Court Rules. Although the list is not exhaustive, none of these issues is present in this case, and Petitioners' asserted reasons do not merit this Court's grant of certiorari.

Mr. Chief Justice Taft, speaking for a unanimous court, has stated:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which are important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955), citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

Petitioners offer no compelling reason as to why this Court should grant certiorari. Without exploring the merits of the case, the instant response will address Petitioners' arguments in support of certiorari *seriatim*, in accordance with the numbered paragraphs set forth in the Petition.

1. **The Opinion of the Circuit Court is consistent with precedent.**

The Opinion of the Third Circuit Court of Appeals does not conflict with Supreme Court decisions cited by Petitioners which would require strict scrutiny of the challenged Pennsylvania Bar Admission Rule.

Pennsylvania's general rule, as noted above, is that only graduates of ABA-accredited law schools may sit for the Pennsylvania Bar Examination. Pa. B.A.R.203 (a)(2)(i). The sole exception is for graduates of non-ABA accredited law schools who are members in good standing of the bar of a state which holds a "reciprocal" agreement with Pennsylvania, and who have practiced law in that reciprocal state for five years.

Thus, Pennsylvania's provision waives the threshold educational requirement for applicants from reciprocal states, but not for applicants from nonreciprocal states. This difference in treatment must advance only a valid state objective; it does not involve a suspect classification or invidious discrimination, or impinge on any fundamental right which would trigger stricter scrutiny.

There is no inherent right to practice law in the state courts until the individual applicant has established the requisite qualifications prescribed by the state. *In re Lockwood*, 154 U.S. 116 (1894). A license to practice law granted in one state does not confer an absolute right to practice law in another state. *Hawkins v. Moss*, 503 F.2d 1171, 1175-76 (4th Cir.), *cert. denied*, 420 U.S. 928 (1974). Neither general principles of comity nor any constitutional provision require the respective states to admit to their bars attorneys admitted in other jurisdictions. *Id.* States have both a duty and a right to regulate the practice of professions within their borders; federal courts should not interfere with such internal regulations unless those regulations invidiously discriminate against a certain class of citizens, or are in no way related to a legitimate state purpose.

a. **The Opinion of the Circuit Court does not conflict with this Court's decision in *Schware*.**

A state's professional licensing statute is deemed constitutional if it is rationally related to a valid state objective. *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232 (1957). The decisions of the lower courts do not, as Petitioners argue, contravene *Schware*. Petitioners are excluded from sitting for Pennsylvania's Bar Examination not because they are "Republican" or "Negro" or "member[s] of a particular church." *Id.* 353 U.S. at 239. Petitioners are excluded because they do not meet the threshold educational requirement, nor come under the sole exception to that requirement. *Schware* did not address reciprocity, nor did it preclude reciprocity as a criterion.

b. **The right to travel analysis articulated by the Circuit Court comports with this Court's decisions.**

The Opinion of the Circuit Court is not in conflict with those opinions of the United States Supreme Court cited by Petitioners. Those decisions hold that durational residency requirements to obtain various governmental entitlements denied equal protection of the law to persons exercising their right to interstate travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). The instant case does not present a residency requirement of any kind. Moreover, the Circuit Court recognized and reviewed each of the cases cited by Petitioners, and satisfied itself that its right to travel analysis in the instant case was in accord with this Court's precedent as cited by Petitioners. Appendix, A-9 through A-16.

c. The Opinion of the Circuit Court does not conflict with rulings of other circuit and district courts.

While at one time, bar admissions standards varied substantially from state to state, the present principal distinction is among those states which allow non-ABA accredited law graduates to sit for their bar examination, and those which require graduation from an ABA-accredited law school in each instance, without exception. Either of these paths meets constitutional requirements; no conflict exists between those lower courts which have considered this issue.[1] Pennsylvania's rule, which treads a middle path to encourage reciprocity, is not unconstitutional for doing so, particularly since, as the lower courts noted, Pennsylvania is entitled to bar all graduates of non-accredited law schools from sitting for the

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1. The federal courts have consistently rejected constitutional attacks upon the requirement of state bars that their members be graduates of ABA accredited law schools. *Huffman v. Montana Supreme*, F. Supp. 1175 (D. Mont. 1974) (three judge court) *aff'd*, 419 U.S. 955 (1974); *Wessel v. Pennsylvania Board of Law Examiners*, 442 U.S. 907 (1979), *dismissing appeal for want of substantial federal question*, 327 Misc. Dkt. 21 (Penna. Jan. 4, 1979); *In re Application of Hansen*, 441 U.S. 938 (1972), *dismissing appeal for want of substantial federal question*, 275 N.W. 2d 790 (Minn. 1978); *see generally, Hicks v. Miranda*, 422 U.S. 332 (1975). [Dismissal for want of substantial federal question is a decision on the merits.] *Hackin v. Lockwood*, 361 F.2d 499 (9th Cir. 1966); *Lombardi v. Tauro*, 470 F.2d 798 (1st Cir. 1972), *cert. denied*, 412 U.S. 919 (1977); *Moore v. Supreme Court of South Carolina*, 447 F.Supp 527 (D.S.C. 1977), *aff'd*, 577 F.2d 735 (4th Cir. 1978); *cert. denied* 439 U.S. 984 (1978); *Donnelly v. Boston College*, 558 F.2d 634 (1st Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 987 (1977).

Other precedent from which review was not sought but which upholds the accreditation requirement include, *inter alia: Shenfield v. Prather*, 387 F. Supp. 676 (N.D. Miss. 1974) (three judge court); *Potter v. New Jersey Supreme Court*, 403 F. Supp. 1036 (D.N.J. 1975), *aff'd mem.* 546 F.2d 418 (3rd Cir. 1976); *Murphy v. Egan*, 498 F.Supp. 240 (E.D. Pa. 1980); *Murphy v. State Board of Law Examiners*, 429 F. Supp. 16 (E.D. Pa. 1977); *Pappanastos v. Board of Trustees, etc.*, 615 F.2d 219 (5th Cir. 1980); *Harris v. Louisiana State Supreme Court*, 334 F. Supp. 1289 (E.D. La. 1971).

bar examination in Pennsylvania—and such graduates are in fact barred in many states.[2]

While the petition for certiorari does not address the issue, Petitioners argued below that the contested Pennsylvania rule was unique among the states. Indeed, the Magistrate's Opinion noted and refused to give credence to that argument. (Appendix, at A-71). Petitioners now downplay the limited application of this bar admission rule in order to persuade this Court to grant certiorari. The rule, affects few persons, and is hardly, therefore, an issue so greatly affecting the public that it merits this Court's review. Simply stated, the issue and its limited ramifications are not "important" enough to receive this Court's review.

d. Pennsylvania Bar Admission Rule 203 does not violate the Privileges and Immunities Clause of Article IV of the Constitution.

Pa. B.A.R. 203 (a) (ii) does not have a disproportionate impact on the practice of law by citizens of the several states who are not residents of Pennsylvania, since the Rule raises no barrier to admission to the bar by nonresident attorneys in order to favor resident attorneys. It erects no "fences" against out of state lawyers . . . to protect in-state lawyers from professional competition. *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), n. 18. Pennsylvania resident attorneys who have not graduated from an ABA accredited school and who have not practiced law in a reciprocal jurisdiction, as required by the rule, are precluded from practicing in Pennsylvania on the same terms as non-resident attorneys.

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2. The Bar Admission Rules of the fifty states are of record below. It would appear that the following states do not allow any exceptions to their requirement that only ABA-approved law graduates may sit for the bar examination: Arizona, Arkansas, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wisconsin.

Moreover, the rule does not prohibit the practice of law in Pennsylvania by nonresidents. In fact, Pennsylvania's rule accommodates the present mobility of the nation's population, leaving untouched the rules of those states which allow no reciprocal admission. Reciprocity is the lynchpin of mobility, and Pennsylvania's rule facilitates relocation by Pennsylvania and out-of-state attorneys.

e. **Pennsylvania's bar admission rule pertaining to graduates of foreign law schools is irrelevant to this Court's inquiry as to whether certiorari should be granted.**

Petitioners' argument as to graduates of foreign institutions raises a red herring, diverting attention from the classification drawn by the contested rule. The comparison of the rules admitting United States law graduates with a rule affecting a classification of graduates outside the purview of ABA accreditation should not be a basis for the grant of certiorari.

Rule 205, addressing the admission of foreign lawyers, is intended to apply only to law schools located without the geographical area encompassed by the accreditation activities of the A.B.A. As the Pennsylvania Supreme Court noted in *Appeal of Murphy* 482 Pa. 43, 393 A.2d 369 (1978), *cert. denied and appeal dismissed sub nom. Murphy v. Pennsylvania State Board of Bar Examiners,* 440 U.S. 901 (1979) at footnote 3:

> Because the ABA did not undertake to evaluate law schools situated outside of the United States, and because this Court was receiving applications from graduates of foreign law schools, our rule was amended . . . to allow a person to sit for the bar examination if he or she "shall have acquired a legal education which in the opinion of the State Board is the equivalent" of the education received in an ABA approved school. This provision was not intended to apply to schools

> located within the geographical area encompassed by the accreditation activities of the A.B.A. . . . 471 Pa. lxxix.

Petitioners have been afforded equal treatment vís a vís Pennsylvania attorneys who graduated from a nonaccredited law school, and who have not practiced for the requisite number of years in a reciprocal jurisdiction.

Indeed, as noted above, the requirement which prevents the instant petitioners from sitting for the bar examination is not more onerous than that imposed upon Pennsylvania natives and residents not admitted in other jurisdictions who, if not graduates of ABA accredited law schools, may not sit for the bar examination. *See Hawkins v. Moss, supra,* finding that, so long as a state does not subject a migrant attorney to more onerous requirements than those imposed on its own citizens, it cannot be said that the state has violated the Constitution.

2. The Opinion of the Circuit Court is not "at odds" with the functioning of our Federal Union.

Pennsylvania's rule, rather than preventing comity, as argued by Petitioners, fosters comity, and the Circuit Court so found.

Petitioners assert that certiorari should be granted because the implications of the decision of the Court of Appeals are "far-reaching."

Petitioners speculate that the Circuit Court's logic could be extended to enable Pennsylvania to "retaliate against California's requirement that all lawyers must take an examination," by refusing to permit California's doctors to practice in Pennsylvania without examination, requiring California to accept Pennsylvania's garbage, demanding that California provide tax breaks to Pennsylvanians, or imposing some other condition wholly unrelated to the practice of law. Petition, pp. 31-32. Such speculation is an illogical extension of the Circuit Court's decision. The Pennsylvania Bar Admission Rules affect lawyers and lawyer applicants only; nothing in the record—or in reason—

would lead to the conclusion that Pennsylvania's Supreme Court, which promulgated the rule, is waiting to step outside this circumscribed group of lawyers and lawyer applicants in an attempt to "coerce" California into a reciprocal agreement. The rule as written encourages reciprocity, which is a legitimate state purpose.

Moreover, the rule as promulgated possesses "some notion of parallelism or mutuality." The Circuit Court made clear that precise mutuality is not necessary, and that finding comports with the caselaw cited in the Circuit Court's Opinion.

The Circuit Court found that Petitioners simply framed Pennsylvania's reciprocity interest too narrowly, in that "Pennsylvania has a legitimate interest in securing mutual treatment for *all* its attorneys seeking admission to the bars of other states," whether from accredited or unaccredited law schools. (Circuit Court Opinion, at A-24).

Thus, despite the whirlwind of Petitioners' impassioned argument, this Court more properly abides by principles of comity and federalism by denying certiorari and refusing to second-guess the Pennsylvania Supreme Court's Bar Admission Rule as to graduates of non-accredited domestic law schools—even if this Honorable Court might prefer some other scheme. This is especially so in light of the deference generally accorded states "as to economic and social matters, and Pennsylvania's 'especially great' interest in regulating its bar." Circuit Court Opinion, at A-27, *citing Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975).

(a) **The Circuit Court properly found the contested classification constitutional.**

Petitioners' argument that graduates of non-ABA approved law schools from non-reciprocal states are held "hostage" by Pennsylvania's rule, does not merit this Court's grant of certiorari. The Circuit Court's Opinion does not suggest that the rule was intended to "harm" either unaccredited law graduates from Pennsylvania or unaccredited law graduates from other states; the Circuit

Court simply noted that precise mutuality or 'mathematical exactitude' in drawing classifications, is not required under the caselaw. Circuit Court Opinion, at A-26, A-27 citing *City of New Orleans v. Dukes,* 427 U.S. 297 (1976) (per curiam).

(b) **Pennsylvania's valid state interest in securing advantages for its lawyers has been articulated in accordance with the decisions of this Court.**

The policies underlying the bar admission rule "could conceivably" have been that policy of encouraging reciprocity which the Circuit Court found sufficient to pass constitutional muster. Nor is this Court's decision in *Nordlinger v. Hahn,* 505 U.S. __ , 120 L. Ed. 2d 1, (1992) to the contrary. *Nordlinger* clearly asserts that, for purposes of rational-basis review, the Equal Protection Clause does not require that the administrative or legislative body whose action is reviewed "actually articulate at any time the purpose or rationale supporting its classification." *Id.,* 120 L. Ed. at 16. That case requires that the legitimate state purpose "may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decision maker," and that requirement is met here. *Id.*

Respondents argued consistently and vigorously in each proceeding below, their right to formulate rules relating to bar admission, and their legitimate state purpose in securing advantages for Pennsylvania lawyers through reciprocity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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